



COMMONWEALTH of VIRGINIA

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June 28, 1991

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The Honorable John C. Watkins Mernber,
House of Delegates P.O. Box 159
Midlothian, Virginia 23113

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My dear Delegate Watkins:

You ask (1) whether the Chesapeake Bay Preservation Act, SS 10-2100 through 10.1-2115 of the Code of Virginia (the "Bay Act"), permits local governments in the region subject to the Bay Act to include in ordinances implementing the Bay Act provisions that "grandfather" certain land uses and development practices, and, (2) If not, whether those local governments may "Vandfatherl certain uses or development rights that might be affected adversely by the Bay Act pursuant to their general statutory authority to adopt zoning ordinances.

1. Applicable Statutes

The Bay Act was enacted in 1988 for "[t]he protection of the public interest in the Chesapeake Bay, its tributaries, and other state waters and the promotion of the general welfare of the people of the Commonwealth." Section 10.1-2100. Local governments in

Tidewater Virginia are required to designate, pursuant to criteria adopted by the Chesapeake Bay Local Assistance Board (the "Board"), Chesapeake Bay Preservation Areas within their jurisdictions and to incorporate measures to protect the quality of state waters into their comprehensive plans, zoning ordinances and subdivision ordinances. Section 10.1-2109. Section 10.1-2115 provides that the Bay Act "shall not affect vested rights of any landowner under existing law."

The general enabling legislation for local zoning ordinances is contained in Article 8, Chapter 11 of Title 15.1, §§ 15.1-486 through 15.1-498. Section 15.1-491(a) authorizes the inclusion in local ordinances of provisions for variances and special exceptions.

Section 15.1-491 provide=

Nothing in this article shall be construed to authorize the impairment of any vested right, except that a zoning ordinance may provide that land, buildings, and structures and the uses thereof which do not conform to the zoning prescribed for the district in which they are situated may be continued only so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years and so long as the buildings or structures are maintained in their then structural condition; and that the uses of such buildings or structures shall conform to such regulations whenever they are enlarged, extended, reconstructed or structurally altered and

may further provide that no 'nonconforming' building or structure may be moved on the same lot or to any other lot which is not property zoned to permit such 'nonconforming' use.

Section 15.1-498 provides:

Whenever the regulations made under authority of this article require a greater width or size of yards, courts or other open spaces, require a lower height of building or less number of stories, require a greater percentage of lot to be left unoccupied or Impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this article shall govern. Whenever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts or other open spaces, require a lower height of building or a less number of stories, require a greater percentage of lot to be left unoccupied or Impose other higher standards than are required by the regulations made under authority of this article, the provisions of such statute or local ordinance or regulation shall govern.

Section 1-13.17 also provides:

When the council or authorities of any city or town, or any corporation, board, or number of persons, are authorized to make ordinances, bylaws, rules, regulations or orders, it shall be understood that the same must not be inconsistent with the Constitution and laws of the United States or of this Commonwealth.

**11. Localities Required to Adopt "Grandfather" Provisions to Protect
Existing Nonconforming Uses from Bay Act Requirements;
Protection of Other Vested Rights Limited to Provisions Consistent with Bay Act**

"The normal purpose of 'grandfather' provisions is to delay application of some new and stricter standard." 1980-1981 Atty Gen. Ann. Rep. 331. In the context of zoning, "grandfather" provisions generally are used to protect a nonconforming use, which is a use lawfully existing on the effective date of the zoning restrictions and continuing since that time in nonconformance to the ordinance. *Knowlton v. Brown & W-Forris Industries of Virginia*, 22* Va. 571, 260 &E.2d 232 (1979). To merit protection as a nonconforming use, "the use must be actual and not merely contemplated." 6 P. Rohan, *Zoning and Land Use Controls* 542.01[51, at 41-14 (1991). "These uses are permitted to continue, although technically in violation of the current zoning regulations, until they are abandoned. An exception of this kind is commonly referred to as a 'grandfather' exception" 21 M.J. *Zoning and Planning* S 5, at 345 (1987). 'Grandfather' provisions normally are included to permit nonconforming uses 'because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of such use." 4 E. Yokley, *Zoning Law and Practice* S 22-3, at 13 (4th ed. 1979).

The term 'vested rights' is not defined in the Bay Act or elsewhere in the Code of Virginia. Generally, a vested right exists when an owner has obtained a permit valid under existing zoning and in good faith incurs substantial obligation in reliance thereon.

[and] his rights to complete the project are generally protected against subsequent zoning amendments." 7 P. Rohan, *supra*, S 52.08[41, at 52-94. Recognizing that in many localities the site plan has replaced the building permit as the most vital document in the development process, the Supreme Court of Virginia has extended the scope of vested rights to include those cases where an owner obtains a special use permit, files and diligently pursues a bona fide site plan, and incurs substantial expense in good faith before a change in zoning. *Fairfax County v. Medical Structures*, 213 Va. 355, 192 S.E.2d 799 (1972); *Fairfax County v. Cities Service*, 213 Va. 359, 193 S.E.2d 1 (1972). See also 1989 Att'y Gen. Nnn. Rep 32, 35-36. In a recent case, the Supreme Court of Virginia has held that the determination of when rights become vested is a judicial function, not properly performed by an administrative official. *Holland v. Johnson, Zoning Admtr.*, Va. ___, 403 S.E.2d 356 (1991).

Section 1-13.17 precludes a local governing body from enacting ordinances inconsistent with state law. See *Loudoun County v. Pumphrey*, 221 Va. 205, 206-07, 269 S.E.2d A61, 362 (1980); *Hanbury v. Commonwealth*, 203 Va. 182, 185, 122 S.E.2d 911, 913 (1961).

Section 15.1-498, simply stated, requires that when local zoning ordinances and other state or local laws or regulations both impose requirements of the same nature with respect to a particular property, whichever statute, ordinance or regulation imposes a higher standard shall govern.

Section 15.1-492 represents a legislative determination that one category of vested rights, those established by an existing nonconforming use, must be "grandfathered." The Supreme Court of Virginia has held that S 15.1-492 "requires local governing bodies adopting zoning ordinances to protect nonconforming uses 'so long as the then existing or a more restricted use continues and such use is not discontinued for more than two years' " *Bd. of Zoning App. v. AdCallay*, 225 Va. 196, 199, 300 S.E.2d 790, 792 (1983) (citation-omitted). Accordingly, in my opinion, S 15.1-492 not only authorizes, but also requires, localities including Bay Act requirements in their zoning ordinances to include "grandfather" provisions designed to protect lawful existing uses that are made noncon-

-fni "grandfather" provisions in

forming by the Bay Act requirements, or to apply existing
their ordinances to achieve that result.

For other categories of vested rights established at various stages in the development process but not yet constituting existing uses -the Bay Act limits local authority to adopt provisions in their local ordinance. Although S 10.1-2115 restricts the protection of vested rights, localities may not define those vested rights by ordinance in a manner that is inconsistent with the Bay Act's express requirements as the majority opinion quoted above notes, must require owners with such vested rights to comply with those requirements to the maximum extent feasible. See 1989 Att'y Gen. Ann. Rep., *supra*, at 36. For example, a locality under the mandatory provisions of the Bay Act may not provide in its ordinance that the owners of all existing subdivided lots are exempt from the buffer zone requirements imposed by the Bay Act and the Board's regulations. A locality may, however, include in its ordinance provisions for reducing the buffer zone requirement to protect vested rights on existing subdivided lots in individual cases through administrative waivers and exemptions (see 7 Va. Reg. Reg. VR 173-02-01.1 S 4.5, at 1146) and exceptions to the criteria (see S 4.8, at 1146). The availability of these waivers and exceptions in a local ordinance is consistent with the protection of vested rights established by S 10.1-2115.

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The Bay Act requires that local governments use the criteria developed by the Board to ensure that land is used and developed in a manner that protects the quality of state waters "consistent with the provisions of (the Bay Act) ., Section 10.1-2111. Nlore specifically, local governments subject to the Bay Act must (1) incorporate the protee
tion of state waters into their comprehensive plans "consistent with the provisions of [the Bay Act]" (9 10.1-2109(B)); (2) have zoning provisions which are "consistent with the pro- visions of [the Bay Act]" and which "shall compiv with all criteria set forth in or estab- lished pursuant to 9 10. 1-2107" (9 10. 1-2109(C)); and (3) incorporate water quality protec- tion into their subdivision ordinances "consistent with. the provisions of [the Bay Act]" and "ensure that all subdivisions developed pursuant to their subdivision ordinances com- ply with all criteria developed by the Board" (5 10.1-2109(D)). The requirements of the Bay Act and the regulations adopted by the Board to implement it would prevail, there- fore, over any less stringent or inconsistent local zoning regulations, including "grand- father" provisions that go beyond protection of existing uses and are not consistent with Say Act requirements regarding protection of water qual@ty--

There are some requirements in the criteria adopted by the Board, moreover, thae do not lend themselves to grandfather provisions. *See, e.g.,* 7:7 Va. Regs. Reg., *suprci* § 4.2(7), at 1143-44 (1990) (pump-out requirements for on-site sewage treatment systems. and reserve Grainfield requirements). Furthermore, a prior Opinion of this Office con- cludes that even a landowner who has a vested right to use his land in a manner previ- ously approved by the locality must comply with the local requirements adopted under the Bay Act to the greatest extent possible. 1989 Att'y C-en. Ann., Rep., -jupra, ,-A! 36 ("fblecause nonconforming uses are contrary to public policy, 'they re protected only to avoid injustice and that is the limit of their protection against ,Onformitvl 1) (citation omitted).

When the General Assembly has enacted a specific statute (concerning the authority of a local governing body to act, reliance upon a more generai grant of powers is not appropriate. *See* Att'y Gen. Ann. Rep.: 1990 at 162, 164; 1987-1988 at 363, 364. It is my opinion, therefore, that with respect to vested rights other than those protected by § 15.1-492 as existing nonconforming uses, localities may not rely on the general zoning enabling legislation to adopt "grandfather" provisions applicable to Bay Act requirements broader than those allowed under the Bay Act itself, but must give effect to those requirements to th* maximum extent feasible consistent with the provisions of the Bay Act and the Board% regulatiom Whether a particular 'grandfather' provision is consis - tent with the Ba3y Act and the Board's regulations is a determination that must, of course, be made on a case-by--case basis.

With kindest regard, I am

Sincerely,

Mary Sue Terry

Attorney General

6:12, 5:67/54-111

(DCR – CBLA B – 003)(12/05)